Supreme Court, U.S.
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No. 10-372

In The

Supreme Court of the United States

GREGORY FORRESTER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY ARGUMENT

The Respondent asserts that the ruling in *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008) supports its position that the Petitioner did not have a right to counsel after his arrest for driving while intoxicated and thus there is no federal question for this court to decide. The type of issue presented in this case was illustrated in the concurring opinion.

" . . . we have recognized that certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." 554 U.S. at 217. Examples are pretrial lineups, preliminary hearings, pretrial psychiatric exam, interrogation, etc.

Since a person only has a very short time frame to gather exculpatory evidence in a drunk driving case, the guiding hand of counsel is either do or die in the few short hours after the suspect is arrested. This is certainly not the precise issue in *Rothgery*, which was a right to the appointment of counsel for an indigent suspect not charged with drunk driving. The time frame for gathering exculpatory evidence however should be just as important as the pretrial issues of lineups, *Miranda* warnings, etc. noted by the concurring justices in *Rothgery*.

The Respondent believes that a defendant does not have the right to counsel before deciding to take an alcohol test as requested by the officer. Its argument is that *Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027 (1985) has settled the issue and a person does not have the right to counsel *prior* to deciding to take the alcohol test. Both the Supreme Court of Arkansas and the Respondent fail to grasp the concept that the attorney requested by the Petitioner shortly *after* the police investigation is finished could be a "fact" witness and not solely acting as counsel under the Sixth Amendment. In other words, the attorney could simply be a conduit through which exculpatory evidence flows. If a person wants to call an attorney for the purpose of having the lawyer come to the jail and take photos of the suspect's eyes, make a video tape of the suspect's sobriety, perform field sobriety tests, or bring money so that an independent alcohol test can be purchased, then the attorney will be a "fact" witness that testifies at trial and does not participate as trial counsel.

In a case decided after *Nyflot*, the Maryland high court ruled that a person has a due process right to counsel before deciding to take an alcohol test. *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986). Cochran was an attorney who took his own portable breath test machine to the jail when called by a drunk driving suspect. The Maryland high court ruled that a suspect would have a right to a face-to-face meeting with the attorney under the due process clause and could take the attorney's breath

test before taking the state requested test if there was not an unnecessary delay in taking the state requested test. If Respondent's argument is correct that *Nyflot* bars the right to counsel before a suspect is required to decide whether or not to take a chemical sobriety test, then *Brosan v. Cochran*, *supra*, needs to be overturned.

In an effort to gather exculpatory evidence at 1:00 a.m. who could the arrested drunk driving suspect call to help gather exculpatory evidence? He certainly is not going to call Joe-the-Plumber. He most likely needs to call an attorney who will know what to do to help the defendant's case regardless of whether that particular attorney would later represent him at trial.

As a practical matter, friends and relatives of persons arrested for drunk driving are not going to have access to the suspect at the times that most DWI suspects are arrested. It is unrealistic to think that a person presenting himself to a jail at 1:00 a.m., telling the jailor that he is the suspect's brother-in-law, friend, co-worker, etc., and is there for the purpose of seeing the suspect in an effort to "gather exculpatory evidence," will actually be allowed into the jail for that purpose. The jailor's response will be that visiting hours are over and the interested person might want to just check back later in the morning. The problem is that later that morning is just too late to gather exculpatory evidence in most drunk driving cases. On the other hand, lawyers are generally able

to see an arrested person just about any time of the day or night.

If the purpose of the criminal justice system is to convict the guilty, but not the innocent, and to provide fair trials to all accused persons, then there is absolutely no reason to deny anyone the right to call an attorney from jail in an effort to gather exculpatory evidence under the Sixth Amendment. The Respondent has failed to advance any reason to deny a person the right to telephone an attorney for a person arrested for drunk driving.

One of the main cases that the Petitioner relies on for relief is *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Idaho App. 1995). In *Carr*, the court ruled that the proper analytical framework for a due process/ right to counsel violation in a drunk driving case is found in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Respondent counters that the *Carr* court was in error on this point and that the controlling law is found in *Medina v. California*, 505 U.S. 437 (1992). (Opp. 7, footnote) The *Medina* court stated, "In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process clause has limited operation." 505 U.S. at 443. Since the right to counsel and the right to gather exculpatory evidence are found in the Sixth Amendment, *Medina* in fact recognizes that the *Carr* court was correct to use the *Mathews* balancing test.

The Respondent has changed the question presented as filed by the Petitioner from a Fifth Amendment due process violation to a Fourteenth Amendment issue. (Opp. i) The Respondent is correct in making that change. The Petitioner made the due process argument referred to in *State v. Carr, supra,* but improperly noted in its brief that it was a Fifth Amendment due process argument. The *Carr* case was argued both at the trial level and at the Supreme Court of Arkansas, so the Fourteenth Amendment issue is properly before this Court.

The Respondent did not disagree with the Petitioner's position that Arkansas law requires a person "arrested" for drunk driving to be tried on that charge or he must plead guilty to that charge. The police and prosecutors *are prohibited* from reducing or dismissing drunk driving charges. That is black letter law in Arkansas. Arkansas Code Annotated 5-65-107. No case cited by the Respondent addresses the exact legal issue of the attachment of the right to counsel under the facts and law of this case.

Some states have statutes that allow suspected drunk drivers to use a phone to contact their lawyers from jail shortly after their arrest. However, many drunk driving suspects face the same dilemma as the Petitioner. Being placed in jail for drunk driving without the benefit of counsel or the right to use a phone to contact any person who could provide exculpatory evidence is the antithesis of fair play. The only logical reason for preventing an arrested drunk driving suspect from contacting an attorney is that

the police don't want the suspect to be able to gather any evidence that contradicts the police evidence. Incommunicado detention of a criminal suspect by the police, in an effort to prejudicially impair his ability to present his defense under the Sixth Amendment, is an affront to a free and just society. It really is just that simple.

The Supreme Court of Arkansas was fairly presented the issue of whether the police can hold a drunk driving suspect incommunicado and can refuse his request to use a telephone to contact an attorney after the police investigation had been completed. The answer is that the police can refuse to let the suspect use the phone to call an attorney because the Supreme Court of Arkansas did not see how "counsel's absence at the time he was jailed might derogate from his right to a fair trial." (App. 1) This was a clear rejection of the Petitioner's arguments made at the trial court and the Arkansas Supreme Court. The Petitioner does not have the ability to make the Arkansas Supreme Court make a more detailed ruling. The Respondent's main argument is that the ruling of the Arkansas Supreme Court forecloses review by the United States Supreme Court on an issue of federal constitutional interpretation. If this were taken to its logical conclusion, any state supreme court could always dodge any federal question presented by the parties and that would be the end of the appeals process.

This case started out in the Arkansas Court of Appeals. The lawyers representing the parties both filed written briefs and made oral argument. After oral argument, a three judge panel of the Court of Appeals transferred the case to the Supreme Court of Arkansas because the case involved an issue of first impression, a matter of federal constitutional interpretation, a substantial public interest, a significant issue needing clarification, and overruling precedent. After the case had been transferred to the Supreme Court of Arkansas, inexplicably, the court issued an order denying oral argument before any briefs had been filed and before either party made any request to have oral argument. Oral argument was never made in the Supreme Court of Arkansas. All of this is on the Arkansas Judiciary website under case no. CR-09-872. This case was fully developed in both the Arkansas Court of Appeals and the Supreme Court of Arkansas and the Respondent has not sufficiently challenged that issue.

The Supreme Court of Arkansas ruling how "counsel's absence at the time he was jailed might derogate from his right to a fair trial" is absolutely puzzling. The police have in custody a person whom they think is intoxicated, and that person attempts to reach out and get assistance from the one person our society recognizes as the best person to help a drunk driving suspect, and yet that contact is now effectively prohibited. The Arkansas Supreme Court ruled that you must prove how you were prejudiced before

you get the right to access the exculpatory evidence. That is like putting a person in a round room and telling them to go sit in the corner. Somehow the court never grasped the concept of exculpatory evidence that is now gone forever, thus precluding the Petitioner from ever receiving a fair trial.

Whittling this case down to its most basic complaint is the issue of gathering exculpatory evidence. Twisting the facts somewhat, suppose that a lawyer specializing in drunk driving cases gets arrested for drunk driving and is not allowed to use the phone to gather exculpatory evidence. The convicted attorney was a man who knew how to save himself, but lacked the ability. No doubt he would feel like a character in a Franz Kafka novella.

In *Payne v. Arkansas*, 356 U.S. 560 (1958), the defendant gave a coerced confession to a murder. The main problem was that the confession was given under the threat of mob violence directed at the defendant himself. The court noted that there were several factors that added to the finding of coercion, but one that stands out, related to the issues of the present case, was the fact that the defendant was not allowed to use the telephone to call anyone prior to the confession. The defendant " . . . was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call . . . " 356 U.S. at 567. Little has changed in Arkansas in the past 52 years.

CONCLUSION

The Petition for Certiorari should be granted for all the reasons listed in Petitioner's Opening Brief and many of the same reasons that the Arkansas Court of Appeals transferred the original case to the Supreme Court of Arkansas. Those reasons being a case involving a matter of federal constitutional interpretation, of a substantial public interest, presenting a significant issue needing clarification, and the possible overruling of precedent. The Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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